IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/11/2003

CORAM

THE HONOURABLE MR.JUSTICE A.K.RAJAN

Writ Petition Nos.17908 of 2003

M/s. Eonour Technologies Limited
No.20, Sir Thi
yagaraya Road
Suite 5, T.Nagar, Chennai 17
rep. by its Managing Director
Mr.Karthik Ramakrishnan ..... Petitioner

-Vs-

The Madhya Pradesh Stock Exchange
Palika Plaza Phase II
201, II Floor
M.T.H.Compound
Indore 452 001
Madhya Pradesh State ..... Respondent

Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Manadamus, as stated therein.

For Petitioner : Mr.T.K.Sheshadri

For Respondents : Mr.Sriram for
M/s.A.S.Kailasam Associates
Mr.Arvind D.Datar
Senior Counsel
for M/s Dua Associates.

:ORDER

The writ petition has been filed by the petitioner for the issuance of writ of mandamus, to direct the Stock Exchange of Madhya Pradesh to grant permission for trading their 3,63,27,271 equity shares on their application dated 09.09.2002. But the respondents did not take any action on the application within the stipulated period of 10 weeks. The petitioner therefore approached the Securities appellate Tribunal under Section 22(A) of the Securities Contracts (Regulation) Act,1 956. But, the Tribunal returned the papers and refrained from deciding the appeal, since the Managing Director of the petitioner company was known to the sole presiding member of the Tribunal. Since there was no alternative remedy, the petitioner approached

this Court for a writ of mandamus as stated above.

2. The petitioner is a public limited company; it acquired shares of M/s. I. Trigger Technologies Private Limited, M/s. Web Net Technologies Private Limited, M/s. Linux Solutions Private Limited and M/s System Telecom and Data Services Private Limited on a "Stock Swap" basis in July,2002. Therefore, those companies became wholly owned subsidiaries of the petitioner company; the valuation report in respect of the aforesaid acquisition was given by Chartered Accountants and the valuation was done on 'discounted cash flow method' which is widely accepted method of valuation. The petitioner convened the extraordinary General Meeting on 27.08.2002 for the purpose of allotment of equity shares of the petitioner company to the members of the said four companies towards the Stock Swap and in consideration of the purchase of shares entered into an agreement. The notice of convening of EGM contains all necessary disclosures required to be made in respect of preferential allotment of shares as per SEBI (Disclosures and Investors) guidelines 2000. At the EGM, petitioner company approved the allotment of 3,63,27,271 equity shares of Rs.2 each at a premium of Rs.9/- to the promoters of the aforesaid four companies and the said pricing was also in accordance with the pricing formula prescribed under SEBI guidelines. The petitioner made application for listing of 3,63 ,27,271 equity shares with various Stock Exchanges. Madras Stock Exchange on 24.09.2002 and from Ahmadabad Stock Exchange on 07.02.2003 gave the approval. The respondent ought to have immediately granted the listing approval; the delay beyond the statutory prescribed period amounts to gross failure to exercise the discretion vested with the respondent; and it causes gross and irreparable hardship to the petitioner and the investors. The fairness of the valuation has been approved by this Court in the scheme of amalgamation sanctioned in the Company Petition Nos.281 to 284 of 2002, by which the four companies were amalgamated with the System Telecom and Data Services Private Limited, by order dated 10.03.2003 by this Court. The respondent failed in its duty to grant the listing within time prescribed. The respective Stock Exchanges have to accord permission within 10 weeks from the date of filing of the application. The appeal filed under Section 2 2(A) of the Securities Contracts (Regulation) Act to the Securities Appellate Tribunal was returned on the ground that the sole member presiding the said Tribunal is personally known to the petitioner. The petitioner has no other option except to approach this Court and hence the present writ petition.

3. (a) The respondent in its counter denied all the averments, and stated further that the writ petition is not maintainable. The Stock Exchange recognized under Securities Contracts (Regulation) Act, 1956 , is not a public body or discharges any public duties and hence not amenable to writ jurisdiction; it is not the "State" or instrumentality of the State Government; the writ petition involved disputed questions of fact; that this Court has no territorial jurisdiction; the issue of shares at Chennai cannot be a basis for writ jurisdiction, merely because shares have been allotted by the petitioner and the Registered members of the petitioner company is maintained at Chennai does not confer jurisdiction; there was no representation or statement made subsequent to the application; the return of the securities appellate Tribunal amount to refusal of appeal and since the

appellate Tribunal is at Mumbai, the petitioner can invoke only the jurisdiction of Mumbai High Court; non-joinder of SEBI which is the regulatory authority is fatal; the alternative remedy against the order of appellate tribunal was not exhausted and hence the writ petition is not maintainable. The petitioner is adopting different yardstick for valuation of the four companies. Hence, it is not acted fairly in the interest of investors of the petitioner's company. The allotment of shares made by the petitioner is not in accordance with the resolution passed in EGM held on 27.08.2002. As per the notice of EGM received by the respondent, the proposed allottees are some companies, but the details submitted by the petitioner for listing the shares are shown to be allotted to a different set of persons. The notice convening the EGM of the petitioner did not contained all the disclosures required under the law for preferential allotment as per SEBI(Disclosure and Investor protection) Guidelines, 2000. The identity of the persons proposed to be allotted were not disclosed in the original notice. The notice furnished to this Court contains alterations which goes to show that the petitioner is not been bona fide in approaching this Court.

3(b). Further it is stated that on the perusal of the financial performance of the petitioner company vis-a-vis, the four companies acquired would indicate that the shares of the petitioner were allotted in gross undervaluation of the petitioner company to the detriment of its investors; higher valuation has been adopted for the four unlimited private companies that were acquired. The higher price of the shares of the petitioner company were recorded at Rs.401 at Madhyapradesh Stock Exchange in March, 2000, Rs.492 at Madras Stock Exchange and Rs.634.75 at Mumbai Stock Exchange in July, 2000, but the allotment of the petitioner share at Rs.11 to the companies is not justifiable and it is a case of gross undervaluation and patently against the interest of the investors; the allotment of the shares either on preferential allotment basis or on a "Stock Swap" basis; the petitioner cannot take the benefit of it. By adopting different yardstick for the valuation of the shares of the acquiring companies, the petitioner had not adopted on fair means detrimental to the shareholders interest. In the event of the petitioner filing the valuation report of their own shares by an independent valuer on the same lines as done in the case of four companies, the respondent will consider the application on merits. The reason for not granting listing permission was the irregularities in issue and allotment of shares. The respondent is ready to consider the same within the parameters and regulations prescribed by the SEBI, if the application is submitted after complying all the requirements stated above.

4. In the reply affidavit filed by the petitioner, it is stated that the writ petition as against the Stock Exchange is maintainable as the Stock exchange is the instrumentality of the State on account of various services that are required to be rendered by the statute and it is regulated by Securities Contract Regulation Act, 1956 (SCRA) as well as by SEBI Act. There is no disputed facts involved in this case. Several requests were made and several representations were made in relation to the telephonic conversation made with regard to the listing of the shares. Further filing of the listing application itself is sufficient and it is the duty of the respondent under Securities Contract Regulation Act, 1956 to dispose of the application with in

the period fixed in the statute. The return of the paper cannot be considered as an "Order" by the Security Appellate Tribunal. Therefore, the petitioner can approach this Court. The objection taken with respect to valuation has been done only as an afterthought. The notice sent regarding EGM contains all the necessary particulars and information. The respondent has deliberately kept the listing pending for extraneous reasons. The respondent oversteps its role while granting listing of shares.

5. The learned counsel appearing for the petitioner submitted, the respondent is amenable to writ jurisdiction of this Court as it is an "authority" for the purpose of Article 226 of the Constitution of India, though it is not considered as "State" or "Instrumentality of the State" under Article 32 of the Constitution of India. It will be included in other authorities having regard to its statutory duty and exercise of power of public notice.

6. In support of his contention, he relied upon the Judgment of Madhya Pradesh High Court reported in 2000 CLC 302, where it has been held that by virtue of the discharge of public duties, the Stock Exchange is amenable to writ jurisdiction. The counsel also relied upon other two decisions reported in Sejal Rikin Dalal Vs. Stock Exchange Bombay (AIR 1991 Bombay High Court 30) and Trilochana Doshi Vs. Stock Exchange India (2000(100 Company Cases) 649), wherein it has been held that the writ of mandamus would lie against Mumbai Stock Exchange and that the Stock Exchange is amenable to writ jurisdiction under Article 226 of the Constitution of India. The learned counsel also replied upon a decision reported in Rakesh Gupta Vs. Hydrabad Stock Exchange (1999)96 Company Cases 645), wherein the Andra Pradesh High Court has held that National Stock Exchange is though situated outside of Andra Pradesh was amenable to writ jurisdiction of Andra Pradesh High Court. The counsel also relied upon the decision of the Calcutta High Court reported in (2002) 108 Company Cases 811, wherein it is held that writ petition is amenable against the Stock Exchange under Article 226 of the Constitution of India, disapproving the decision of the Kerala High Court in AIR 1995 Kerala 373 and 1995(83) Company Cases 79 4, which held that the Cochin and Bangalore Stock Exchanges were held not amenable to writ jurisdiction on the facts of those cases. The counsel also referred to the judment of Madras High Court in A. Vaidyanathan Vs. Union of India ((2000)101 Company casses 224), wherein this Court has held that where a the company exercises or performs a public duty a writ would lie but the facts of the said cases the Stock Exchange was not discharging a public duty and therefore held that the writ did not lie on the facts of the case. But the counsel pointed out that in the unreported Judgment in W.A.No.368 and 369 of 1998, wherein the Division Bench of this Court has held that even private companies are amenable to writ jurisdiction when "Functions of an instrumentality, agency or person are of public importance following public interest element". Therefore, the counsel submitted that the Stock Exchange which discharges public duty or a public function is amenable to writ jurisdiction. Therefore, the writ petition is maintainable. The learned counsel further submitted that since the shares of the company were issued within the jurisdiction of this Court and the petitioner's registered office is located within the jurisdiction of this

Court and persons whose favour the shares are allotted are also within the jurisdiction of this Court, this Court has jurisdiction to entertain the writ petition, since the cause of action has arisen with in the jurisdiction of this Court. The Stock Exchange has got the power to list the shares coupled with duty to disclose of any made to list within the statutory prescribed time. There is no necessity for remainders or further representation to be made by the respondent. Since the respondent has abdicated its power to grant or refuse the listing within the statutory period, the respondent cannot grant or refuse listing after the prescribed period was over. In support of the contention, he relied upon the judgment of the Supreme Court in 1993(2) SCC 654, wherein the Supreme Court has held as follows:
"If no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract..... When he failed to do so within the stipulated period of 15 days enforced under Section 8(1)(a), then the respondent has been given a right under the terms of the contract to avoid the remedy under Section 8(1)(a) and request the court to appoint an arbitrator."

7. The learned counsel further submitted that it is not necessary for the petitioner to approach the Mumbai High Court as there is no order or decision made by the Securities Appellate Tribunal. The mere return of papers does not amount to an order or decision; The tribunal has refrained from deciding the appeal. This writ petition is filed on the original cause of action; and not because he was aggrieved by the decision of the appellate Tribunal.

8. The learned counsel further contended that the nonjoinder of SEBI is not a necessary party in this proceeding. The counsel submitted that the original notice of EGM was sent on 02.08.2002 but revised notice was sent on 05.08.2002 which contains some particulars inadvertently omitted in the first notice. The revised notice was also filed along with the listing applications. No one including SEBI has raised any objection. The Stock Exchange, Mumbai did not also raise this objection. The allotment has been made to persons other than the existing shareholders in consideration of purchase of shares acquired from the said allottees. Therefore, it is preferential allotment. The respondent is not justified in questioning the valuation made, since it is already been approved by the Madras High Court while sanctioning the scheme of amalgamation. The Madras and Ahmadabad Stock Exchange have already granted listing permission. While so, the objection raised by the respondent is not tenable.

9. The respondent is entrusted with discretion, but attempting to bring irrelevant consideration it failed to exercise its discretionary power. Therefore, the petitioner is entitled to writ of mandamus as prayed for. The learned counsel referred to the judgment in Ikhlaq Mohamed and another Vs. Union of India and another (AIR 1983 HIMACHALPRADESH 75), wherein that when the passport authorities neither refused nor granted passport, the Court directed to issue passports. Therefore, on the same analogy, in this case also when the Madhyapradesh Stock exchange has neither refused nor granted permission, a writ of mandamus can be issued.

10. The learned counsel for the respondent submitted that the respondent is not an "authority" of the Government and therefore, not amenable to the writ jurisdiction. In support of his contention, he relied upon the Judgment in Satish Nayak Vs.Chochin Stock Exchange Limited and others (AIR 1995 Karnataka 373), and also on an unreported judgment in W.P.No.19509 of 1994 and the case in A.Vaidyanathan VS. Union of India and others (1998 WLR 690). Further the counsel contended that in the light of the judgment of this Court in A.Vaidyanathan VS. Union of India and others (1998 WLR 690), since that decision is binding on this Court that has to be followed in preference to other decisions. Since this Court has held in that case that Stock Exchange is not amenable to the writ jurisdiction, the writ petition is not maintainable.

11. The learned counsel further contended that the contentions raised by the petitioner involves disputed questions of facts in respect of notice of EGM in which the proposed allottees are different from the persons to whom subsequently the shares were allotted. The discrepancy sought to be explained in the reply affidavit does not indicate that it was a revised notice. Therefore, the decision depends upon the factual question which is disputed, hence the writ petition does not lie.

12. Further it was contended by the learned counsel that this court has no territorial jurisdiction as the respondent carries on business in Madhya Pradesh and the prayer for listing of the shares in Madhya Pradesh Stock Exchange. The counsel, for that purpose relied upon the decision in Union of India and others Vs. Adani Exports Ltd., and another (2002(1) SCC 567), and also a decision in Navinchandra N. Majithia Vs. State of Maharashtra and others (2000(7)SCC 640), and contended that this Court has no jurisdiction on the facts pleaded, since the facts of this case is similar to that the facts in the decision of the Supreme Court. Further, the learned counsel for the respondent submitted that alternative remedy is available to the petitioner under Section 22(A) of the Securities Contract (Regulation) Act, 1956
approached Mumbai High Court and not this Court. As per the Securities Contract (Regulations) Act, 1956, against an orders of the Tribunal, appeal lies to the High Court. Therefore, when the securities appellate Tribunal returned the papers, an appeal should have been filed to the Bombay High Court. Further the decision in S. Ramanathan Vs. Union of Inida and Others (AIR 2001(2) SCC 118), sets out the effect of ommission of an athority to perform its statutory duties. In such circumstances, the Court can only direct the authority to perform its statutory duties. Therefore, the writ petition is liable to be dismissed.

13. From the contentions raised by the petitioner and the respondent, the point that is to be decided is that whether the non-performing of the duties by the Madhyapradesh Stock Exchange within time prescribed under the statute prohibits the Stock Exchange from passing any order subsequent to that date, and does it amount to abdication of its rights. Whether this Court has got territorial jurisdiction.

14. As per Section 4 of the securities Contract (Regulation) Act, 19

56, the Central Government may grant recognition to the Stock Exchange subject to certain conditions prescribed under the Act. It has got the power to withdraw recognition under Section 5 and Central Government when called for periodical returns from the Stock Exchange or direct enquiries with respect to Stock Exchange and as per Section 7 of the Act, every recognised Stock Exchange shall furnish to the Central Government, the Annual Report containing particulars prescribed by the Central Government. It also has the power of restricting voting rights under Section 7(A). The Central Government has got power to make rules under Section 8 with respect t o the Governing bodies of the Stock Exchanges. Therefore, this regulatory power of the Central Government over the Stock Exchange makes it an authority "under the Control of the Government of India" within the meaning of Article 12 of the Constitution of India. Therefore, the Stock Exchange falls within the definition of the State under Article 12 of the Constitution of India. Therefore, the writ petition lies against Stock Exchanges.

15. Section 22(A) of Securities Contract (Regulation) Act, provides for an appeal when the request was refused by the Stock Exchanges or omission or failure or failure to pass an order on the request of listing of securities. The securities appellate Tribunal may after giving opportunity to both sides may pass an order according to law. When the Stock Exchange has omitted to pass order or failure to pass order, an appeal lie on the Securities appellate Tribunal. But, in this case, when the appeal was so filed that was returned on the ground that the sole member of the Tribunal due to some personal reasons, refused to entertain that appeal. This returning of appeal petition for some reasons, is refusal to pass orders by the Tribunal. That create a cause of action. When the Tribunal at Bombay refuses to entertain any matter as it situate within the territorial jurisdiction of Bombay, only the Bombay High Court should be approached for any redressal. If that is not done, it amount to ignoring the appeal preferred to the appellate Tribunal. Inasmuch as the fact remains that an appeal was presented to the Tribunal; that act of presentation of appeal to the appellate Tribunal cannot be ignored and it provides a cause of action. That cause of action having arisen within Bombay, the Bombay High Court alone has jurisdiction. On the other hand, the contention of the petitioner is that since the letter was addressed from Chennai to Madhya Pradesh Stock Exchange as well as the Bombay Stock Exchange, failure to act both by the Bombay Stock Exchange and Madhya Pradesh Stock Exchange, gives a cause of action for the petitioner and therefore, on the basis of the part cause of action, writ petition can be filed in the Madras High Court is not acceptable. If that is accepted, it amounts to ignoring the factum of presenting appeal tot he appellate Tribunal. In view of the fact that Tribunal has refused to exercise jurisdiction, the writ petition should be filed in Bombay High Court against the order of the Tribunal refusing to exercise its powers. Therefore the writ petition filed before this Court is not maintainable.

16. With respect to the argument that when the statutory authority failed to exercise the power conferred on it within the time limit prescribed by the statute, the argument of the petitioner is that it is tantamount to abdication of its power and therefore after the expiry of the period of time, the statutory authority cannot exercise that power. Therefore, Madhya Pradesh

Stock Exch ange cannot any more pass an order either accepting or rejecting the request for listing the shares. But, the Supreme Court in S.Ramanathan Vs. Union of India and others ((2001)2 Supreme Court Cases 118) has held in a similar condition where the authorities did not exercise the power within the stipulated period, directed the higher authorities(the State Government and the Central Government) to consider the question and pass appropriate orders. Therefore in this case also at the most this Court can pass an order to consider the case of the petitioner and pass orders on merits. It cannot grant the relief of mandamus as prayed for. In a matter like this, namely, listing of shares, a mandamus cannot be issued as it involves complicated questions of fact which can be considered only by the concerned authorities.

17. When the shares are listed in Stock Exchange, the public gets the right and opportunity to deal with those shares. Considering the fact that there were some irregularities committed by number of persons due to which large number of people lost their entire investment. The SEBI is therefore interfered to safeguard the interest of the investors and to see that the public at large do not get affected. In order to safeguard the interest of thousands and thousands of people, it is necessary for the Stock Exchange to ascertain the permissibility of the shares for trading. Therefore, there is no duty caused on SEBI as well as Madhya Pradesh Stock Exchange to be satisfied to the marketability of the shares. Therefore, the Madhya Pradesh Stock Exchange has to take a decision with respect to the marketability and only then can list the shares for trading.

18. A writ of mandamus for listing of shares cannot be issued in a matter like the case on hand which involves complicated questions of fact which can be considered only by the concerned authorities. This court cannot decide those issues as it do not have that expertise. At the most, this Court can pass an order to consider the request of the petitioner, which the respondent is prepared, provided the necessary particulars are given. In such circumstances, the writ of mandamus cannot be granted and on this ground also the writ petitioner cannot succeed. For the foregoing reasons, the prayer in the writ petition cannot be granted.

19. Further it is stated in the counter that the respondent has nothing against the petitioner company. In the event of the petitioner filing the valuation report that was asked for, the listing permission could be considered. It is also stated that the permission was not granted only on account of irregularities, in the allotment of shares. If the application is submitted after complying the requirement, the respondent would consider the same as per the rule prescribed by SEBI. Therefore, the petitioner is bound to furnish the particulars called for by the Madhya Pradesh Stock Exchange and when so furnished, the respondent would consider the request. If even after furnishing those particulars, if the Stock Exchange fails to consider the representation, the petitioner can approach the appropriate forum.

In the result, the writ petition is dismissed as devoid of merits. No costs.

Index:yes

Internet:yes

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